DISTRIBUTED
MAY 24 1985

Supreme Court, U.S.
FILED
MAY 24 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1655

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

---

MARY P. LAFFEY, *et al.*,
*Petitioners,*

v.

NORTHWEST AIRLINES, INC.,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## REPLY BRIEF FOR PETITIONERS

---

DANIEL A. REZNECK
TIMOTHY J. LINDON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20008
(202) 872-6700

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
*Counsel for Petitioners*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF AUTHORITIES

*Cases* Page

*Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974) ..... 9
*Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541 (1984) ..... 1, 3, 5, 9
*Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984) ..... 8
*Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*) ..... 7
*Craik v. Minnesota State University Bd.*, 738 F.2d 348 (8th Cir. 1984) ..... 9
*Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984) ..... 5
*Graves v. Barnes*, 700 F.2d 220 (5th Cir. 1983) ..... 7
*Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) ..... 5
*Hall v. Borough of Roselle*, 747 F.2d 838 (3rd Cir. 1984) ..... 7, 8
*Hensley v. Eckerhart*, 461 U.S. 424 (1983) ..... 7, 8
*Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3798 (May 14, 1985) ..... 10
*Louisville Black Police Officers v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983) ..... 8
*McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984) ..... 8
*National Assn. of Concerned Veterans v. Sec. of Defense*, 675 F.2d 1319 (D.C. Cir. 1982) ..... 9
*Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77-C-39 (N.D. Ill. Sept. 14, 1984) ..... 9-10
*Yates v. Mobile County Personnel Board*, 719 F.2d 1530 (11th Cir. 1983) ..... 9

*Miscellaneous*

Berger, *Court Awarded Attorneys' Fees: What Is Reasonable?*, 126 U. Pa. L. Rev. 281 (1977) ..... 7

## REPLY BRIEF FOR PETITIONERS

The issues in our petition are squarely presented, have widespread practical importance, and warrant this Court's consideration. Northwest's attempt to obfuscate these realities does not bear analysis, as we show herein. In addition, in a transparent effort to poison the atmosphere, Northwest proffers a number of irrelevant and grossly inaccurate assertions; we correct some of these in footnotes herein.[1]

---

[1] Preliminarily, we address three of those assertions:

Northwest asserts that plaintiffs' counsel have not been "treated penuriously" by a decision that will yield them "in excess of $1 million" (Br. Op. 1). The result of the holding below has not yet been quantified, and doing so would not be easy, for plaintiffs' counsel did not have a "schedule" of fees (Br. Op. 4), but, rather, had widely-ranging fees reflecting the relative capacities of their clients to pay. That aside, the reasonableness of the total amount of the fee cannot be assessed in the abstract but must be judged in the light of the effort being compensated. Here, assuming that Northwest means to be saying that the decision below will yield in excess of $1 million in fees for litigating the merits, dividing that figure by 11,263 hours would yield an average hourly rate of less than $90 per hour, substantially below the rates upheld for very inexperienced lawyers in *Blum v. Stenson*, 104 S.Ct. 1541, 1544 n.4 (1984). And it is not clear that Northwest's $1 million figure is meant to be the yield just for those hours; Northwest may intend that figure to encompass hours spent litigating the fee issue, and even expenses, in which event the hourly rates would be less than $75 per hour.

Northwest suggests that, apart from denying a quality multiplier, the district court merely rubber-stamped plaintiffs' fee request (Br. Op. 2). In fact, the district court analyzed the fee application objectively and meticulously, and denied compensation altogether for 522 attorney hours and 520 paralegal hours for which compensation was sought (App. 87a, 96a-100a, 135a-137a); reduced the lodestar rate for one of plaintiffs' lawyers (App. 109a, n.37); reduced the rates for 35.5 hours worked by other lawyers (App. 91a); denied three of the four upward adjustments sought by plaintiffs: for exceptional performance (App. 113a-114a), exceptional results (App. 114a), and delay in receipt of payment (App.

1. *Lodestar Rates.* The first question presented is whether lawyers in a given community of the same skill, experience and reputation are to receive the same lodestar rate when they represent prevailing plaintiffs in civil rights cases, or whether the lodestar rate is to vary depending upon the nature of the clientele the lawyers have chosen to represent in the *remainder* of their practice. Several circuits have held the former (Pet. 18-19; *infra* at 5); the court below the latter. These different answers reflect a fundamental dispute over what Congress intended when it enacted the civil rights fee statutes—a dispute that warrants this Court's attention.

The issue is squarely presented by this case. The district court found (and the court of appeals did not dispute) that the prevailing market rates in the community charged to fee-paying clients by lawyers of the skill, experience and reputation of plaintiffs' counsel are the

---

120a-123a); and denied reimbursement of over $25,000 of plaintiffs' litigation expenses (App. 128a-132a).

Northwest's brief contains a lengthy recital of the supposed excesses of plaintiffs' counsel in the fee litigation. In fact, the district court found that plaintiffs' counsel had reasonably expended 2106 hours litigating fees (App. 101a)—out of 2579 sought (App. 92a)—and the court of appeals affirmed that finding (App. 51a-52a). As the district court explained, the high number of hours was the product of two phenomena: the extensive documentation requirements imposed upon fee claimants by the courts (requirements that were particularly time-consuming in this case given the scope and length of the litigation (App. 100a)), and, most importantly, the manner in which *Northwest* chose to defend the fee claim: "Defendant has approached this fee petition with an intensity and vigor even greater than that which characterized its litigation strategy on the merits" (App. 139a). Plaintiffs' merely "responded" to a litigation course dictated by Northwest (App. 100a). For example, nearly one-fifth of all the compensated hours were spent responding to Northwest's massive discovery requests (App. 98a). Northwest asserts that "more attorneys worked on the fee request than ever worked on the merits" (Br. Op. 2). The sole activity for several of those attorneys was compiling the information demanded in Northwest's discovery requests respecting their personal role in litigating the merits.

rates reflected in the matrix of lodestar rates the district court adopted (App. 103a).[2] The district court further found (and again the court of appeals did not dispute) that the reason plaintiffs' counsel do not in fact charge these rates to *their* fee-paying clients is not a reflection of the skill, experience and reputation of plaintiff's counsel but rather of "the particular clients the firm chooses to represent and their ability to pay" (App. 103a). Accepting these premises, the court below held nonetheless that plaintiffs' counsel are remitted to their lower rates—rates which are *not* "the prevailing market rates in the relevant community" (*Blum v. Stenson*, 104 S.Ct. 1541, 1547).

Northwest's suggestion that the issue is one of limited importance is wrong. There are numerous highly qualified lawyers in private practice who have chosen

---

[2] Northwest states that the lodestar rates awarded by the district court are "almost double" those charged by plaintiffs' counsel to their fee-paying clients (Br. Op. 2). In the court below, Northwest provided a more accurate assessement, showing that the district court's lodestar exceeded by 46% the lodestar proposed by Northwest on the basis of plaintiffs' counsel's billing rates. Brief for Northwest in Court of Appeals, p. 19.

Northwest asserts that the lodestar rates adopted by the district court were "large-firm . . . rates," charged by firms that use different "staffing patterns" than here, including a greater reliance on associate (as compared to partner) time (Br. Op. 18, n.4). But the record showed without contradiction that small and medium size firms whose lawyers have the same skill and reputation also charge the rates adopted by the district court, including firms whose partner-associate ratios are far more heavily skewed to partners than is true of plaintiffs' counsel's firm. Moreover, the district court found that in appropriate circumstances large firms adopt the same litigation staffing patterns as here (App. 90a, n.18), and concluded that "[i]n light of the complexity of the case, the novelty of the issues raised, and the caliber and tenacity of the defense, . . . the Court does not find this allocation of tasks either surprising or inappropriate" (App. 91a, n.19).

careers representing labor unions, individual working people, civil rights groups, environmental organizations, and other clients at rates below those they could command if they chose to represent a more affluent clientele; these lawyers frequently undertake the representation of plaintiffs in civil rights cases. The opinion below would fix the lodestar rates for all such lawyers at the rates charged to their regular clientele, even though those rates do not reflect the skill, experience, and reputation of the lawyers.[3] Thus, the *amicus curiae* has a far more accurate perception than Northwest of the significance of the holding below.

---

[3] Northwest attempts to depict the opinion below as "fact-specific," and as not dispositive of the fate of other lawyers whose rates, because of the nature of the lawyers' clientele, are below the prevailing market rates for lawyers of comparable skill, experience, and reputation (Br. Op. 13-17). But the opinion does not admit of such an interpretation. The opinion below would control the determination of lodestar rates for *all* lawyers who represent labor unions, working people, civil rights groups, environmental organizations and other similar clients at rates below what they would command from a more affluent clientele. Indeed, the court below perceived itself to be issuing a ruling of general application. See App. 18a-36a.

Northwest seizes on the word "presumptively" and the concept of "bracketing" in the opinion below, stating that "[t]he court held that a private lawyer's customary billing rate is the *presumptively* reasonable lodestar rate for his time in statutory fee cases, but only if his customary rate 'falls within the [range of] rates charged by other firms for similar work.' " Br. Op. at 16-17 (quoting App. 41a) (emphasis and brackets in original). But, this "qualification" of the ruling below does not somehow alter the issue here or make it "fact-specific." Under the court's bracketing concept, a fee applicant whose regular billing rates are found, as here, not to reflect his or her skill, experience, and reputation, will nevertheless be restricted to those billing rates in the calculation of fee awards whenever there are other lawyers who, because of the nature of their clientele, also charge fee-paying clients less than those lawyers could command based on their skill, experience and reputation—a situation which prevails wherever there are private lawyers representing unions, civil rights or environmental groups, or similar types of clients.

In addition to the cases cited in the petition, another recently-published Circuit decision conflicts with the holding below on this issue. *Garrity v. Sununu*, 752 F.2d 727, 739-40 (1st Cir. 1984). In that case, the district court, ruling before this Court's decision in *Blum*, had fixed the lodestar rates at the attorneys' own "average hourly [billing] rates", but had then awarded 20% "bonuses" to account for the fact that the attorneys' own rates were below those prevailing in the community for lawyers of the same skill and experience. The First Circuit stated, 752 F.2d at 739-40:

> On the facts of this case, and taking into account that the lower court lacked the guidance of *Blum* at the time it ruled, we sustain the challenged upward adjustments even though we recognize that under *Blum* certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates.[4]

2. *Quality Adjustment.* Our contention—that if lawyers who choose to represent a particular clientele at rates below those they could otherwise command in the marketplace are consequently to have their lodestar rates held down, then a quality adjustment is permissible—is plainly supported by the First Circuit's holding in *Garrity*, quoted *supra*, and that decision is in conflict with the holding of the court below on this point.[5]

---

[4] That Circuit's prior opinion in *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 956 (1st Cir. 1984), cited by Northwest (Br. Op. 19, n.5), is not to the contrary. In *Grendel's Den*, the court indeed reduced a lodestar hourly rate, as Northwest says, "to the rate actually charged to other clients" (Br. Op. 19, n.5)—$175 per hour. But the court did so only after determining that those other clients "were major institutions which could afford to pay top dollar," 749 F.2d at 956.

[5] Northwest has misrepresented the holding below, by suggesting that one of the reasons a remand was not allowed to permit reconsideration by the district court of a quality adjustment was the district court's observation respecting the percentage of partner time devoted to this case (Br. Op. 22). The court of appeals did not mention that factor in its ruling (App. 41a-42a, n.128), and

3. *Contingency Adjustment.* The court below ruled that a district court is without discretion to award a contingency adjustment in a massive class action brought with a 50% chance of non-recovery. In an effort to obscure the obvious importance of the issue posed by that ruling, Northwest grossly mischaracterizes the holding below: "The court . . . merely held that the district court's findings were inadequate to justify a 100% contingency premium in this case" (Br. Op. 23; see also *id.* at i, question 3). What the court below held is *not* that a 100% adjustment was excessive, but that "*no* risk enhancement should be awarded" (App. 51a, emphasis added; see also *id.* 54a).

Thus, two of the points made by Northwest with regard to the issue of the risk adjustment are beside the point, as well as inaccurate. The court below did not simply hold that the district court applied the wrong legal standard in assuming that "plaintiffs' counsel were '*entitled*' to a contingency adjustment" (Br. Op. 23). Had that been the limit of the appellate court's ruling, the risk issue would have been remanded to the district court. Rather, as just stated, the court held that the district court was *not permitted* to award *any* risk adjustment.

Similarly, Northwest's attempted demonstration (Br. Op. 7-8, 24-25) that the risk in this case declined over time does not bear on the question whether the court

---

for a good reason: the district court's observation had related to a different issue. Under D.C. Circuit law at the time the district court ruled, quality adjustments could be awarded for either of two reasons: to reflect exceptional *performance* (*i.e.*, performance of a quality exceeding that expected of a lawyer commanding the lodestar rates used) or exceptional *results* (litigating the case in fewer hours than would have been expected to achieve the results obtained). *See* App. 112a-113a. The district court had denied a quality adjustment for exceptional *performance*—the only claim at issue here—for the reasons stated in our petition (App. 113a-114a). The district court had cited the percentage of partner time only as a reason for denying an adjustment for exceptional *results* (App. 114a).

below was correct in ruling that the district court was without discretion to award any risk adjustment. Contrary to Northwest's erroneous assertions (Br. Op. 9, 25), the supposed declining risk was not relied upon at all by the court below in reaching its conclusion that "no risk enhancement should be awarded." [6]

---

[6] Given its irrelevancy to the issue presented, we note only briefly that Northwest's "declining risk" argument is flawed both legally and factually. As a matter of law, the prevailing view is that the risk is to be assessed as of the time that the litigation was undertaken by the lawyer, for it is at that time that the attorney must evaluate the risk of failure and determine whether the case is worth pursuing as an economic matter. Once the lawyer commits himself to the case he is obliged to devote all efforts necessary to pursue diligently all reasonable claims regardless whether the risk thereafter increases or decreases. Berger, *Court Awarded Attorneys' Fees: What Is Reasonable?*, 126 U. Pa. L. Rev. 281, 324-26 (1977). *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (Opinion of Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun and Stevens); *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*); *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir. 1983); *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3rd Cir. 1984).

And, as a matter of fact, every hour worked in this case was at risk at the time it was worked. It was not until the denial of certiorari on the merits *this year* in No. 84-825 that Northwest's efforts to escape the major liability findings were finally put to rest. Between 1978 (when Northwest's earlier petition for certiorari was denied) and 1985, the bulk of the time of plaintiffs' counsel was devoted to defending against Northwest's efforts to escape the liability findings on the basis of allegedly supervening decisions of this Court (App. 118a-119a, n.49); the remainder was devoted to litigating the appropriate remedies for the violations that Northwest was still seeking to overturn. To be sure, Northwest gave up the fight on a few minor issues in 1975, and as to the work done on those issues there was no longer a doubt that compensation would be forthcoming. But all work done on those issues was done *before* NWA gave up the fight, when there was a risk of not prevailing. That plaintiffs had prevailed on those issues did not mean that counsel would be compensated for the work thereafter done on the issues whose outcome still was in dispute. *Hensley v. Eckerhart, supra.*

Northwest's effort to characterize the holding below as fact-specific (Br. Op. 25) and of "no importan[ce]" (*id.* 23), because the opinion did not foreclose the possibility that there might be "exceptional" cases in which a contingency adjustment would be allowable, is doubly inaccurate. In the first place, the holding that contingency adjustments are available only in "exceptional" cases itself merits this Court's review. The only four Justices on this Court to address the question have declared precisely the opposite: "These factors are potentially relevant in every case." *Hensley v. Eckerhart*, 461 U.S. 424, 448-49 (1983) (Opinion of Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall, Blackmun, and Stevens, quoted more fully at Pet. 22-23). Not one of the opinions of the ten Circuits cited at Pet. 23, n.16 purports to limit contingency adjustments to "exceptional" cases. And, aside from the decision of the Seventh Circuit, the decisions cited by Northwest at Br. Op. 24, n.6, do not adopt such a limit; those decisions manifest that those courts would have affirmed the contingency adjustment awarded by the district court here.[7]

---

[7] Thus, in *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1138 (11th Cir. 1984), the court stated: "When the attorney fee is contingent on success, the hourly rate should *ordinarily* be raised to compensate the attorney for the risk of non-recovery" (emphasis added). In *Hall v. Borough of Roselle*, 747 F.2d 838, 843 (3rd Cir. 1984), the court expressly adopted the position of Justice Brennan *et al.* (see Pet. 22-23), and the contingency adjustment was reversed in the particular case only because "from the very outset, liability of the defendants was clear." In *Louisville Black Police Officers v. City of Louisville*, 700 F.2d 268, 280 (6th Cir. 1983), the court *affirmed* a contingency adjustment, declaring that the decision whether to award one "is within the sound discretion of the district court" and noting that "a substantial upward adjustment to compensate for the risk" is warranted "in cases involving developing areas of law [and] in which the facts are strongly disputed." Only *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), accords with the decision below, as we acknowledged at Pet. 23 & n.17.

Indeed, previously the D.C. Circuit itself had held that "a premium should *generally* be awarded if counsel would have obtained no fee in the event the suit was unsuccessful." *National Assn. of Concerned Veterans v. Sec. of Defense*, 675 F.2d 1319, 1323 (D.C. Cir. 1982) (emphasis added). But the decision below construes this Court's opinion in *Blum* to require abandonment of that position. App. 49a. Whether *Blum*—which said merely that the Court had "no occasion in this case to consider" the question (104 S.Ct. at 1550 n.17)—has been understood correctly by the court below to have answered the question (an understanding not shared by the dissent below, nor by any of the other post-*Blum* Circuit Court decisions cited at Pet. 23 n.16) deserves this Court's attention.

But even if the premise of the court below were accepted, and contingency adjustments were allowable only in "exceptional" cases, the holding below that massive class actions undertaken with a 50% risk of non-recovery are not "exceptional," and thus cannot warrant a contingency adjustment, would be of immense importance. It is precisely in massive litigation such as this that the availability of contingency adjustments is *most* important, for if such adjustments are not available qualified attorneys will be deterred from undertaking such litigation. *See, e.g., Craik v. Minnesota State University Bd.*, 738 F.2d 348, 350-51 (8th Cir. 1984); *Yates v. Mobile County Personnel Board*, 719 F.2d 1530, 1534 (11th Cir. 1983). As then-Professor Richard Posner explained, in an affidavit submitted in an antitrust case, it is "[b]ecause these are big cases" and therefore "the investment of the attorney's time and effort—an investment that he loses entirely if the suit is unsuccessful—is very large" that contingency adjustments are warranted, for in their absence attorneys would opt for "the more secure forms of practice." [8]

---

[8] Affidavit of Prof. Posner in *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974), quoted in *Phemister v. Harcourt Brace*

Indeed, the deterrent effect of the decision below is likely to be greater still, for in identifying the characteristics that render a case *not* "exceptional," the opinion has effectively left no room for *any* case to qualify for a contingency-adjustment. *See* Pet. 12, 21 n.15.[9]

Respectfully submitted,

DANIEL A. REZNECK
TIMOTHY J. LINDON
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20008
(202) 872-6700

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
*Counsel for Petitioners*

---

*Jovanovich, Inc.*, No. 77-C-39 (N.D. Ill. Sept. 14, 1984) (slip op. at 42).

[9] Northwest attempts to lay on plaintiffs' counsel's doorstep the responsibility for the 15-year duration of this case (Br. Op. 26 and n.8). But as the district court has explained, that responsibility rests with Northwest, which "vigorously and unremittingly litigated every aspect of this case" (App. 118-119a, n.49), including three appeals on the merits and a seven-year effort to relitigate the basic liability rulings following the initial denial of certiorari in 1978 (*id.*). Northwest's suggestion that the parties commence fee negotiations in 1978 (Br. Op. 26)—a suggestion that if adopted would not have led to plaintiffs' counsel being paid at that time, but merely to fixing the amount to which they would become entitled if Northwest's efforts to overturn the liability rulings ultimately failed—was "rejected" by the district court (App. 77a, n.2; App. 123a, n.57), at plaintiffs' urging, for the dual reasons that there remained substantial merits litigation still to be conducted and plaintiffs' counsel would have confronted an arguable conflict of interest were they to negotiate their fees with Northwest at the same time they were litigating their clients' claims against Northwest. *Cf., Jeff D. v. Evans*, 743 F.2d 648, 651-52 (9th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3798-99 (May 14, 1985).